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October 29, 1998

VIA MESSENGER

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas, Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: CC Dockets No. 98-79, 98-103, 98-161, 98-167, 98-168

Dear Ms. Salas:

On Tuesday, October 27, 1998, Lisa Anderson and the undersigned, counsel for ACI Corp. and FirstWorld Communication, Inc., met with Paul Gallant, Legal Advisor to Commissioner Tristani, to address the issues raised in the captioned proceedings arising from the digital subscriber line ("DSL") tariffs filed by Bell Atlantic, BellSouth, GTE and Pacific Bell. The views of ACI and FirstWorld are reflected in their previously filed comments in these dockets.

ACI and FirstWorld agree that the DSL tariffs proposed by these incumbent local exchange carriers ("LECs") should properly be classified as interstate services under the Communications Act of 1934, as amended (the "Act"). We believe, moreover, that the interstate classification of DSL telecommunications services does not conflict with — and that these proceedings need not address — the jurisdictional classification of local exchange business lines purchased by Internet service providers ("ISPs") for use in providing "dial-up" Internet access to ISP customers. Thus, the Commission need not and should not overrule existing state regulatory commission decisions requiring incumbent LECs to pay "reciprocal compensation" for traffic exchanged with competitive LECs ("CLECs") for their ISP end user customers.

Specifically, ACI and FirstWorld discussed the following points regarding DSL jurisdictional classification, pricing and reciprocal compensation:

1. The Commission Need Not Address Reciprocal Compensation in Classifying DSL Tariffs as Interstate

Several commenters in the these proceedings argued that classifying DSL services as interstate would allow incumbents LECs to avoid their obligation to pay reciprocal compensation to CLECs for the origination and termination of dial-up calls from end users to ISPs. This is simply not the case. The Commission can determine that the DSL tariffs are interstate under its settled jurisdictional separations rules for dedicated services, without addressing reciprocal compensation derived from switched services.

DSL services are dedicated, non-switched "mixed-use" facilities, used to transport both interstate and intrastate traffic, and are therefore subject to the Commission's long-standing "ten percent rule" for jurisdictional classification of dedicated private line and special access services. Accordingly, the incumbent LECs' DSL services are correctly classified as interstate.[1] Such a finding would not raise the issue of how to classify switched calls from end users to ISPs, which are the basis for reciprocal compensation. This point was not only noted by ACI and FirstWorld in their comments, but has also been recognized by the National Telecommunications and Information Administration in its recent letter to Chairman Kennard.[2]

Moreover, there is no open proceeding or pending request that would compel the Commission to address the reciprocal compensation issue. The petition by the Association for Local Telecommunications Services was withdrawn, and no incumbent LEC has sought relief from the Commission for the unanimous state decisions classifying local exchange dial-up services as intrastate for reciprocal compensation purposes. Consequently, there is neither a legal nor practical reason for the Commission to go beyond DSL jurisdiction and address reciprocal compensation issues in these tariffing proceedings.

2. Classifying Local Exchange Business Services as Interstate When Use by ISPs for Internet Access Would Create Substantial Analytical and Practical Problems

Several of the incumbent LECs have argued, in state proceedings, that local business lines used by ISPs should be considered interstate under a so-called "end-to-end" analysis. As ACI and FirstWorld explained, this analysis is faulty because it confuses the service purchased by ISPs (switched local exchange services) with the "interstate" Internet services ISPs offer to their own subscribers. More importantly, classifying local exchange services and other intrastate services as interstate when used by the customer as part of the customer's interstate network would create substantial analytical and practical problems.

For example, in the case of private line service between San Francisco and Los Angeles, a call over the private line is clearly an interLATA toll call, traditionally classified as intrastate and subject to state regulatory jurisdiction. When such a private line is purchased by an interexchange resale carrier, the "end-to-end" analysis suggested by the incumbent LECs would compel the conclusion that this intrastate facility is suddenly transformed into an interstate facility because it is used by the reseller as part of the reseller's own interstate service offerings. That cannot be the case, and accepting this analysis would therefore require — if the analysis were applied consistently — the jurisdictional reclassification of all facilities and services purchased

[1] Comments of ACI and FirstWorld at 4-8.

[2] Comments of ACI and FirstWorld at 18-20; Letter from Larry Irving, NTIA, to Chairman William E. Kennard (Oct. 27, 1998).

by interstate providers out of incumbent LEC intrastate tariffs. In short, the "end-to-end" analysis proves too much, because it would result in the reclassification, and preemption of state jurisdiction, of many intrastate facilities and services that have always been subject to state tariffing and regulation under the Act.

To reclassify intrastate facilities as interstate merely because those facilities are used as part of a network to provide interstate services would pervert the distinction between local and interstate traffic. This would, in turn, create substantial practical problems in administration of shared federal/state jurisdiction over telecommunications. For example, such a classification would subject revenues from local exchange service provided to ISPs to federal Universal Service Fund requirements, stripping them from the universal service programs of state commissions. It would be improper and impractical for the Commission to shift local exchange revenues, traditionally included in state universal service programs, to the federal jurisdiction as a result of reclassifying ISP use of local business lines.

More significantly, reclassifying the intrastate facilities used to connect end users to the Internet as interstate services could jeopardize the ability of competing carriers to access the unbundled network elements needed to provide DSL service. If the local loop input used provide DSL becomes an interstate, and not intrastate, facility by virtue of the Internet services provided over the loop, then questions may be raised as to whether those loop facilities are subject to the unbundling requirements of Section 251 of the Act. At the very least, therefore, as ACI and FirstWorld strongly urged in their comments, the Commission to should reaffirm, as it has held in the past, that incumbent LEC facilities (including DSL-capable loops) must be offered on an unbundled basis whether the carrier requesting unbundling uses those facilities for intrastate or interstate services.[3]

3. The Commission Cannot Avoid Examining DSL Pricing for Anticompetitive Price Squeezes Merely Because DSL Competitors Offer Data-Only Services on Unbundled Incumbent LEC Loops

Some of the incumbent LECs have argued that the Commission should view the ability of competitive LECs to offer voice and data services simultaneously on an unbundled loop as the answer to charges that incumbent LECs are imposing price squeezes on their DSL competitors. Under this theory, it would be permissible for an incumbent LEC to include no loop cost in its own DSL prices, while charging competitors substantially higher prices for DSL-capable loops, because the incumbent LEC also uses the loop to provide voice telecommunications services. This is an incorrect comparison and an anticompetitive remedy that forces competitors to enter a secondary market in order to provide DSL services.

Comparing incumbent LEC DSL prices to CLEC voice *and* DSL prices is incorrect because the DSL competitors seek to compete in the data telecommunications services market. The Act permits carriers to purchase unbundled network elements for use in whatever services

[3] Comments of ACI and FirstWorld at 19-20.

they desire. Thus, price squeeze analysis must compare the incumbent LECs' DSL prices, and their input costs, with the loop, collocation and related DSL costs imposed on DSL competitors. Economically, the Commission must compare like services, not the strawman "data and voice" service hypothesized by the incumbent LECs. Hence, because the incumbent LECs offer and price their own DSL services on a stand-alone basis — without reference to voice services — analysis of whether their proposed interstate DSL prices are just and reasonable must use the same basis for comparison.

The combined data/voice price squeeze comparison suggested by the incumbent LECs is plainly anticompetitive, because it would require DSL competitors to enter both the data and voice services markets in order to be price competitive with incumbent LECs for DSL services. Antitrust precedent holds that such a requirement for "two-tier" entry is impermissible. Under its merger guidelines, the Department of Justice ("DOJ") recognizes that forcing new entrants in a primary market to also enter a secondary market would have an adverse impact on competition. Accordingly, DOJ indicated that it would not, as a condition for merger approval, force new entrants in a primary market to also enter a secondary market if there was "sufficient unintegrated capacity" in that secondary market. Applying this principle to DSL services, there are many voice providers and sufficient unintegrated capacity in the voice market, and thus there is no justification for requiring DSL providers to provide voice services as well. Indeed, there would be significant adverse consequences upon local competition by forcing new DSL entrants to divert their focus and resources from high-speed data services to voice services, thereby giving incumbents free reign over the revolutionary potential of the DSL market. For many DSL competitors, the market of first-choice is data services. Forcing these competitors to enter a second market merely in order to compete in the market of their choice is a barrier to entry that is plainly inconsistent with the competitive principles outlined in the DOJ merger guidelines.

Pursuant to Section 1.1206 of the Commission's Rules, two copies of this letter are enclosed for filing. Please contact me should you have any questions in regard to this matter.

Sincerely,

Glenn B. Manishin

cc: Paul Gallant
Robert M. Pepper, OPP
Kathryn C. Brown, Chief of Staff